In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

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No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

BRIEF FOR RESPONDENT, THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a National Banking Association).

ALLEN L. CHICKERING,
WALTER C. FOX, JR.,
VINCENT I. COMPAGNO,
111 Sutter Street, San Francisco 4, California,
Attorneys for Respondent.

CHICKERING & GREGORY,
111 Sutter Street, San Francisco 4, California,
Of Counsel.

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BRIEF FOR RESPONDENT,
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(a National Banking Association).

I.

OPINIONS BELOW.

The Opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 141 Fed. (2d) at page 285, and appears also in the Record at pages 1996-2004. References herein to particular portions of such Opinion are to the Record. The Opinion of the District Court is reported in 45 Fed. Supp. at page 524, and 26 Fed. Supp. at page 240, and appears in the Record at pages 440-457.

II.

STATEMENT OF BASIS OF JURISDICTION.

Petitioners invoke the jurisdiction of this Court under section 240(a) of the Judicial Code, USCA Title 28, section 347(a). Petitioner Ernest H. Denicke invoked the jurisdiction of the District Court under section 24 of the Judicial Code, USCA Title 28, section 41. Petitioners invoked the jurisdiction of the Circuit Court of Appeals of the Ninth Circuit under section 128(a) of the Judicial Code, USCA Title 28, section 225(a).

III.

CORRECTED STATEMENT OF THE CASE.

The petitioners' statement of the case is confused and incorrect. A fair and concise statement of the case appears in the opinion of the United States Circuit Court of Appeals (R1996-2002). Accordingly we adopt the Court's

statement and refer this Court to said opinion for a statement of the facts. For the convenience of the Court, we have incorporated in the Appendix hereto, a complete, but rather lengthy, statement of the facts.

IV.

ARGUMENT.

Petitioners, in effect, ask for certiorari upon eight grounds, to-wit:

(1) The claim that the United States Circuit Court of Appeals refused to review the record before, and the decision of, the United States District Court;

(2) The claim that said Court did not conform to the decisions of this Court requiring special findings, under rule 52(a) FRCP;

(3) The claim that petitioners were not given an opportunity to present evidence;

(4) The claim that petitioners were entitled to a hearing *en banc*, as a matter of right;

(5) The claim that the District Court had no power to approve a compromise and dismissal of a deriative action under rule 23(c) FRCP;

(6) The claim that the petitioners were arbitrarily denied the right of cross-examination, after dismissal;

(7) The claim that the petitioners were arbitrarily denied the right to take depositions, after dismissal; and

(8) The claim that petitioners were arbitrarily denied the right to amend their second amended complaint and intervene, after dismissal.

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(1) CLAIM THAT THE UNITED STATES CIRCUIT COURT OF APPEALS HAS REFUSED TO REVIEW THE RECORD BEFORE, AND THE DECISION OF, THE UNITED STATES DISTRICT COURT.

This claim, like most of the claims made by petitioners, is almost too absurd to warrant a reply. After the decision in the District Court, an appeal was taken to the United States Circuit Court of Appeals by the petitioners (R746). The record was docketed, and a motion made by petitioners to enlarge the record in the Circuit Court of Appeals (R1892). Said motion was granted (R1953). Written briefs were filed and oral argument was had before three judges of the United States Circuit Court of Appeals on February 15, 1944 (R1994). Petitioners were represented by Aaron M. Sargent. The appeal was submitted to the Court for decision (R1994). The opinion of the Court was filed with its clerk on March 1, 1944 (R2004). The decree was entered upon the same day (R2005).

Petitioners contend that no valid opinion was ever rendered by the United States Circuit Court of Appeals. The basis of this contention seems to rest upon a claim that the Circuit Court of Appeals has failed to comply with subdivision 5 of its Rule 3 dealing with "Terms and Sessions of Court". Petitioners contend there was noncompliance by asserting that a copy of the written opinion filed with the clerk of the Court was not signed by each member of

the Court hearing the oral argument. Regardless of whether the assertion be true or not, the rule does not require that each or any of the three judges hearing the appeal sign a written opinion. It merely provides that an appeal is decided when (1) announced from the bench, when (2) signed opinions are filed with the clerk, or (3) when documents evidencing the decision of the Court are filed with the clerk.

The record shows that the Honorable Clifton Mathews, Circuit Court Judge, advised petitioners' counsel from the bench, in open Court, that "the opinion (on file with the clerk (R1996-2004)) was unanimous" (R2058). Counsel was also advised in open Court that the action of the Court's clerk in filing said opinion and entering the decree "was in accordance with the direction of the Court, all three of the judges being in accord" (R2058). All of said matters have been certified to this Court over the hand and seal of the Clerk of the United States Circuit Court (R2078).

There can be no question but that the petitioners are not and never have been in doubt as to the fact that the appeal has been decided, or that the opinion in the record is the unanimous opinion of the judges to whom said case was assigned and submitted for decision. The petitioners have requested a rehearing (R2017). Of what? Of that very decision. They have requested a reassignment of the case for hearing *en banc* (R2015). Why? Because it had been decided. They have requested a stay of mandate (R2062-2066). They have requested a transmittal of that very opinion to the clerk of the above-entitled Court

(R2070). Counsel for petitioners is laboring under no misapprehension as to what the decision of the Court was, what judges concurred, or what their opinion was. Counsel is merely endeavoring to create an atmosphere of irregularity in the record in the hope of bolstering his clients' cause.

Furthermore, the foregoing rule of the Circuit Court is for the guidance and protection of the Court's clerk and not of interest to the petitioners (R2058).

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(2) CLAIM AS TO SPECIAL FINDINGS.

Special Findings, under rule 52(b) FRCP, were not required as the proceeding below was not a trial of the case upon the facts without a jury, but a hearing upon the question of whether or not a compromise and dismissal of the action was in the best interests of the Anglo Bank, the party for whom the suit was brought and, indirectly, all of its shareholders.

On the other hand, the District Court did make special Findings of Fact. The Judgment (R459) contains the following special findings: "'Finds that all the allegations contained in paragraphs I to IX, inclusive, of said petition to terminate, filed under date of March 19, 1942, are true and correct; that said defendant Anglo Bank and its representatives in filing said petition have acted in good faith and for the best interests of said Anglo Bank and its shareholders; that due notice was given to the shareholders of said Anglo Bank of the filing of said petition to terminate

and the determination of the Bank's representatives in connection therewith and of the time and place fixed for the hearing of said petition; that the only objections filed to said petition were those of the plaintiff, Ernest H. Denicke, and Mary E. Doble, a shareholder, both being represented by the attorney for the plaintiff; that all of said objections are without merit; that it is for the best interests of the defendant Anglo Bank and its shareholders that the above-entitled action be dismissed with prejudice upon the said Anglo Bank receiving the sum of $200,000 in lawful money of the United States."

The above Findings are all that was necessary to support the Court's approval of a dismissal of the action with prejudice (*Hazeltine Corporation v. General Motors Corporation,* 131 Fed. (2d) 34 (1942); *Sonken-Galamba Corporation v. A. T. & S. F. Ry. Co.,* 34 Fed. Supp. 15 (1940), at page 16; *Klimkiewicz v. Westminster Deposit & Trust Co.,* 122 Fed. (2d) 957 (1941), at page 958; *Dubiske v. U. S.,* 98 Fed. (2d) 361 (1938), at page 364); such Findings may be contained in the decree (*Hyland v. Miller's National Insurance Co.,* 92 Fed. (2d) 462 (1937), at page 464; *F & C Co. of New York v. Allen,* 84 Fed. (2d) 53 (1936), at page 54).

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(3) CLAIM THAT PETITIONERS WERE NOT GIVEN AN OPPORTUNITY TO PRESENT EVIDENCE.

There were six days of trial in open court in July, 1941, in a joint hearing on this action (R989-1844). Twelve witnesses were sworn and testified, thirty exhibits were

offered by the petitioner Denicke and received, and thirteen exhibits were offered by the Anglo Bank and received. The Anglo Bank's president, Mr. William H. Thomson (R1031) and its first vice-president, Mr. Allard A. Calkins (R1769) testified and were cross-examined by petitioners, along with other bank officials. Written briefs were filed (R1844). A hearing in open court was had on March 31, 1942 (R1845). Two bank officials testified and were cross-examined by these petitioners (R1856, 1849). Additional exhibits were offered by petitioners and received (R1857, 63, 65, 70). Previous to said latter hearing, there were two days of pre-trial hearing before the District Court (R968, 971). Ten depositions were taken by petitioners (Rxii), during the three and one-half years the case had been pending. About every form of discovery available to a litigant was made use of by the petitioners (R925, 983). Petitioners and their counsel participated in all of the foregoing. It is not comprehendible how petitioners can contend that they were not given an opportunity to offer evidence.

Not only is the foregoing true, but counsel for the petitioners at the close of the hearing on March 31, 1942, advised the Court that in his judgment *the evidence already in* was "sufficient to justify an order that the petition be denied" (R1883), that he would "submit the matter on the showing made and on the arguments I have (he had) made and on the briefs already on file" (R1888). There can be no question but that counsel for the petitioners voluntarily submitted the case on the evidence before the Court when he made the following statement at

the very close of the case: "We submit it" (R1890). The demands for the right to put in further evidence came after the entry of an unfavorable decision.

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(4) CLAIM OF RIGHT TO REHEARING EN BANC.

Counsel point to no law or authority, nor to any rule or intimation by any Court that counsel was entitled to have the petitioners' petition for rehearing *en banc* passed upon by all of the judges of the Circuit Court of Appeals for the Ninth Circuit. A rehearing *en banc* is not a matter of right. It is a matter of grace. If every petition for a rehearing *en banc* is required to be passed upon by the entire Court, each such petition would, in effect, bring about such hearing, since all of the judges would be required to pass thereon. If such rule were adopted, the very purpose of having more than three circuit judges in a circuit would be largely thwarted. The purpose of additional judges is to expedite the decision of cases. The rule for which counsel argues would decidedly slow down the procedure.

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(5) CLAIM THAT DISTRICT COURT HAD NO POWER TO APPROVE A COMPROMISE AND DISMISSAL OF THE ACTION.

Whitten v. Dabney (171 Cal. 621, 154 Pac. 312) is the leading case in California dealing with the control of the Trial Court over derivative litigation. The California Supreme Court in that case held that the shareholder-plaintiff commencing derivative litigation to enforce the

rights of his corporation did so as a trustee; that his position was equivalent to that of a guardian ad litem; that he was permitted to sue simply in order to set in motion the judicial machinery of the Court and that after the commencement of the litigation, the Court, and not the shareholder, had the power to compromise the rights of the corporation. *Russell v. Weyand* (5 Cal. App. (2d) 259 (1935), 42 Pac. (2d) 381) held that the corporation and not the plaintiff was the real party-plaintiff in the action, that it was the duty of the Court, before whom the action was pending, to protect the interests of the corporation by exercising supervision over the conduct of the plaintiffs. *Loeb v. Berman* (217 Cal. 716 (1933), 20 Pac. (2d) 685) held that the corporation, when acting in good faith, could by a cross-complaint declare upon the same cause of action and, when it did so, the stockholder-plaintiff from that moment on became a supernumerary party.

The reasoning of the California Supreme Court is sound and logical. The Washington Supreme Court in *Goodwin v. Castleton* (144 Pac. (2d) (Wash. 1944) 725) reached the same conclusion. In fact, said Court cited the opinion of the District Court in the within case in reaching its conclusion. Delaware and Massachusetts reached a similar conclusion (*Karasick v. Pacific Eastern Corporation,* 180 Atl. (Del. 1935) 604, and *Cutter v. Arlington Casket Co.,* 151 N. E. (Mass. 1926) 167, at page 170). The United States Circuit Court of Appeals for the Ninth Circuit followed the principal of law enunciated in said California cases. It reached that conclusion due to the fact that it approved the principle of law and the fact that no Federal law to the

contrary was presented (R2003-2004). It did not base its decision upon *Erie R.R. Co. v. Tompkins* (304 U. S. 64) though, in our opinion, it might have done so. The case of *Cohen v. Young* (127 Fed. (2d) 721) is in entire harmony with the opinion of the Circuit Court of Appeals (135 Fed. (2d) 625).

All of the cases cited by petitioners in this connection (Petitioners' Brief, pages 58, 59) involved cases under the Chandler Act and not under rule 23(c).

In one breath, petitioners argue that the United States Circuit Court of Appeals erred in following the local law (Petitioners' Brief, page 67) and in the next breath argue that said Court should have followed the local law (Petitioners' Brief, page 65). Petitioners' difficulty is that they fail to appreciate what the local law is. They refer the Court to *Klopstock v. Superior Court* (17 Cal. (2d) 13, 108 Pac. (2d) 906, 135 A.L.R. 318) and *Eggers v. National Radio Co.* (208 Cal. 308, 281 Pac. 58), but these decisions are not in point, as the Court there dealt not with the control of the Court over a derivative suit once commenced, but with the right of a plaintiff-shareholder, or his representative, to commence derivative suits. *Whitten v. Dabney*, supra, is definitely the leading case in California on the question.

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(6) CLAIM OF RIGHT TO CROSS-EXAMINE BANK OFFICIALS.

Two of the three bank officers (William H. Thomson, president, and Allard A. Calkins, first vice-president) the petitioners contend they had no opportunity to cross-exam-

ine were, in fact, cross-examined in open court (R1186, 1203, 1823, 1774). No request was ever made of the District Court of the right to cross-examine the third individual at the numerous hearings had before the entry of judgment and no plausible reason for not making such request has yet been given by petitioners.

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(7) CLAIM OF PETITIONERS OF RIGHT TO TAKE DEPOSITIONS OF HIGH OFFICIALS IN WASHINGTON, D. C., AFTER ENTRY OF JUDGMENT DISMISSING THE ACTION.

A party-litigant's right to take depositions under rules 23 and 31 FRCP exists while the action is "pending" only—not after it has been terminated upon Court order. In making their application after judgment, petitioners made no showing of diligence or relevancy of the proof sought. In fact, the record before the District Court conclusively showed lack of diligence and lack of relevancy.

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(8) CLAIM OF RIGHT, AFTER ENTRY OF JUDGMENT, TO FILE THIRD AMENDED COMPLAINT AND TO INTERVENE.

After the hearing on Anglo Bank's petition to terminate, and the entry of judgment dismissing said action, petitioners sought to file a third amended complaint, broadening their claims and setting up new causes of action. The application to amend was untimely and the District Court was fully justified and could only have denied such request (*Gallagher v. Pacific American*, 97 Fed. (2d) (1931) at 195, Ninth Circuit).

Petitioner Doble's application to intervene was not only after judgment and untimely, but it followed a motion made by her, prior to the hearing on the Anglo Bank's petition (R345), to intervene as party-plaintiff, which motion had been denied by the District Court (R398) without an appeal being taken. Furthermore, shareholder Doble appeared at said hearing on March 31, 1942, pursuant to an Order to Show Cause (R259), filed her written objections (R340) and participated in said hearing. Subsequently, she appealed to the Circuit Court of Appeals and through counsel presented to said Circuit Court oral arguments and a written brief. Under the holding of the Court in *Cohen v. Young* (127 Fed. (2d) 721, at page 724), she has been granted everything that she has requested, to which she is entitled.

The decision below does not present any question necessitating a review by the United States Supreme Court. It is not in conflict with any decision of any high Court, nor with any decision of another Circuit Court. No question of particular public interest is involved. The petitioners had their day in Court, but received an adverse decision upon a conflict of evidence. The Trial Court acted to protect the best interests of the Anglo Bank, the party for whose benefit the suit was commenced, instead of furthering the personal aims of the petitioners and their attorney, at the expense of the bank. The Appellate Court affirmed the judgment of the Trial Court while proceeding in the ordinary and usual manner. Evidence, if there be any, as

to claims of petitioners against the Reconstruction Finance Corporation and certain high officials in Washington, is wholly without the issues in the suit before the Trial Court and could not play any part in the deliberations of that Court, even though it had been timely presented.

Respondent urges that the Writ be denied.

Dated, San Francisco, California,
July 17, 1944.

Respectfully submitted,
ALLEN L. CHICKERING,
WALTER C. FOX, JR.,
VINCENT I. COMPAGNO,
Attorneys for Respondent.

CHICKERING & GREGORY,
Of Counsel.

(Appendix Follows.)